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In The
Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari
To The Arizona Supreme Court

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

In *Walton v. Arizona*, 497 U.S. 639 (1990), this Court ruled that the Sixth Amendment does not require a jury determination of aggravating and mitigating circumstances under Arizona's capital sentencing procedures. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held, in a non-capital case, that facts increasing the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. Should *Apprendi* be interpreted to overrule *Walton* and this Court's long line of capital cases holding that Eighth Amendment sentencing determinations, which narrow the category of defendants eligible for the death penalty, can be made by either a judge or a jury?

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STATEMENT OF THE CASE

This case raises the question whether this Court should reverse its decision in *Walton v. Arizona*, 497 U.S. 639 (1990), that the Sixth Amendment does not require a jury determination of aggravating circumstances necessary to impose a capital sentence. Even though *Walton* has never been repudiated or criticized as creating an unfair or unreliable capital sentencing process, Petitioner Timothy Ring has asked this Court to reverse *Walton* and order the Arizona state courts to resentence him.

Ring and his accomplices, James Greenham and William Ferguson, murdered Wells Fargo Armored Services driver John Magoch on November 28, 1994. On that day, Magoch and his partner, Dave Moss, stopped their armored truck outside a department store in Glendale, Arizona, and Moss went into the store. When he returned, the truck was gone. *State v. Ring*, 25 P.3d 1139, 1142 (Ariz. 2001).

Several hours later, police located the Wells Fargo truck in a parking lot and found Magoch's body on the passenger compartment floor. Magoch had been fatally shot in the head. *Id.* Approximately $563,000 in cash and $300,000 in checks had been removed from the truck. *Id.*

The criminal investigation began to focus on Ring and his accomplices after Greenham's ex-girlfriend spoke with police officers in January 1995. Law enforcement officers obtained a wiretap and recorded incriminating conversations between Ring and his accomplices. *Id.* at 1143-44. Officers searched Ring's

home and found evidence tying him to the crime, including approximately $272,000 in cash. *Id.* at 1144. Officers also learned that Ring, Greenham, and Ferguson had been spending thousands of dollars in cash. *Id.* at 1143-44. Following a jury trial, Ring was convicted of first-degree murder, conspiracy to commit armed robbery, armed robbery, first-degree burglary, and theft. *Id.* at 1142, 1144.

At Ring's sentencing hearing, Greenham provided additional details of the crime. Greenham testified that he, Ring, and Ferguson planned and carried out the robbery. *Id.* at 1144. Ring was the leader of the group, and Ring shot Magoch with a rifle. *Id.*

The trial court sentenced Ring to death on the first-degree murder conviction after finding two aggravating circumstances: (1) pecuniary gain, and (2) the offense was committed in an especially heinous or depraved manner. *Id.* The trial court found, as a non-statutory mitigating circumstance, Ring's "minimal criminal record," but concluded that it was not sufficiently substantial to call for leniency. *Id.* at 1145. The trial court imposed prison sentences for Ring's other felony convictions. *Id.* at 1142.

Ring appealed to the Arizona Supreme Court, arguing, among other things, that Arizona's capital sentencing statute is unconstitutional because it violated his Sixth Amendment right to have a jury make factual findings regarding aggravating and mitigating factors. The Arizona Supreme Court affirmed Ring's convictions and sentences, specifically rejecting Ring's Sixth Amendment argument. *Id.* at 1154, 1156. The Arizona

Supreme Court struck the heinous/depraved aggravating factor, but affirmed the death sentence after independently reweighing the remaining aggravating circumstance of pecuniary gain against the minimal mitigation. *Id.* at 1156.

This Court granted Ring's petition for certiorari review of the Arizona Supreme Court's decision regarding his Sixth Amendment claim.

SUMMARY OF ARGUMENT

I. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not compel overruling the holding in *Walton v. Arizona*, 497 U.S. 639 (1990), that Eighth Amendment determinations that narrow the category of defendants who may be sentenced to death do not implicate the Sixth Amendment.

A. *Walton* is one in a long line of opinions holding that either a judge or a jury can make determinations regarding Eighth Amendment limitations on capital punishment. This Court has repeatedly held that the Sixth Amendment does not require a jury to make Eighth Amendment determinations, such as *Enmund/Tison*[1] findings, *see Cabana v. Bullock*, 474 U.S. 376 (1986), *overruled in part on other grounds by Pope v. Illinois*, 481 U.S. 497 (1987); the existence of aggravating and mitigating factors, *see Walton;* and the weighing or reweighing (by an appellate court) of aggravating and

[1] *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

mitigating factors, *see Clemons v. Mississippi*, 494 U.S. 738 (1990).

Apprendi can be harmonized with *Walton*. *Apprendi* holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Findings regarding aggravation and mitigation under Arizona's capital sentencing scheme do not increase the penalty for first-degree murder beyond the prescribed statutory maximum. Arizona's first-degree murder statute provides that the range of punishment for that crime is either life imprisonment or death. ARIZ. REV. STAT. (A.R.S.) § 13-1105. Thus, the prescribed statutory maximum for the crime Ring committed is death. *Apprendi* is distinguishable on that basis alone.

Other concerns underlying the *Apprendi* decision are similarly absent in the instant case. For example, the defendant in *Apprendi* was only on notice that he was being charged with a second-degree offense, which would subject him to a specific range of punishment. He was punished, however, with a sentence beyond the range for a second-degree offense based on a fact (the crime was motivated by racial bias) not alleged in the charging instrument. Thus, the defendant was effectively punished for a first-degree offense even though he was only on notice that he was being charged with a second-degree offense.

In contrast, the State charged Ring with, and convicted him of, a class one felony. He was on notice from the date of indictment that he faced a possible death sentence if convicted of the charged offense. The due

process and notice concerns underlying the *Apprendi* decision are simply not present in the instant case.

B. Historical sentencing practices afford no basis for finding that Arizona's capital sentencing procedures violate the Sixth Amendment. Arizona's death penalty statute does not reduce the scope of the jury's traditional role of determining guilt or innocence. Arizona juries continue to make all decisions regarding the elements of the crime of first-degree murder, and the concern raised in *Apprendi* regarding an "unacceptable departure from the jury tradition," 530 U.S. at 497, is not present in this case.

The Arizona Legislature enacted Arizona's capital sentencing statute to satisfy the Eighth Amendment requirement imposed in *Furman v. Georgia*, 408 U.S. 238 (1972), that the sentencer's discretion in a capital case be adequately channeled. The Eighth Amendment *narrowing* function prescribed by *Furman* is unrelated to the historical role of the jury in determining guilt or innocence. Overruling *Walton* based on *Apprendi*'s mechanistic approach would create a new, unjustified Sixth Amendment right that the Framers never intended.

C. Notwithstanding more than ten years of post-*Walton* capital litigation in Arizona and other states with similar sentencing schemes, the rationale underlying *Walton* and the other cases cited above has never been repudiated. Absent some indication that *Walton* and those cases result in unfair or unreliable capital sentencing, this Court should not reverse its express holding that a determination of aggravating and mitigating factors can be made by either a judge or a jury without violating the Sixth Amendment.

II. Any error in having a judge, rather than a jury, determine aggravating circumstances is harmless in this case. The jury's verdicts of guilt of felony murder and armed robbery necessarily imply the existence of the pecuniary gain aggravating factor underlying Ring's sentence. Accordingly, Ring's sentence should not be set aside.

III. If this Court decides to overrule *Walton*, the holding should not be applied retroactively. In *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion), this Court noted that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment." Accordingly, overruling *Walton* was not foreseeable, and a change from having a judge determine aggravating and mitigating factors would not be a "watershed" rule of criminal procedure that implicates the fundamental fairness and accuracy of a criminal proceeding. *See Teague v. Lane*, 489 U.S. 288, 295 (1989).

ARGUMENT

I. *APPRENDI* DOES NOT COMPEL OVERRULING *WALTON*'S HOLDING THAT THE SIXTH AMENDMENT DOES NOT REQUIRE A JURY DETERMINATION OF AGGRAVATING FACTORS UNDER ARIZONA'S CAPITAL SENTENCING PROCEDURES.

Walton v. Arizona, 497 U.S. 639 (1990), was a well-reasoned extension of existing case law and is consistent with this Court's rulings in cases addressing related issues. *Walton* has never been criticized as creating an

unfair or unwise rule in capital cases, and Arizona and other states have long relied on it in conducting capital sentencing proceedings.

The holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that facts that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, can be harmonized with *Walton*. Findings regarding aggravating factors under Arizona's capital sentencing statute are necessary under the Eighth Amendment; they do not, however, increase the range of punishment for a charged offense of first-degree murder in Arizona. Accordingly, the Sixth Amendment due process and notice concerns underlying the *Apprendi* decision are not present in the capital sentencing context.

A. *Apprendi* Can Be Harmonized with *Walton* Because in Arizona a Death Sentence is Within the Range of Sentences Available for a Charged Offense Of First-Degree Murder, and the Due Process and Notice Concerns Underlying *Apprendi* Are Not Implicated by Arizona's Capital Sentencing Procedures.

In *Apprendi*, the defendant pled guilty to possession of a firearm for an unlawful purpose, a crime designated in New Jersey's substantive criminal statute as a second-degree offense, punishable under New Jersey's felony sentencing statute by a five- to ten-year prison term. 530 U.S. at 468-70. The charging instrument made no reference to a third New Jersey statute aimed at hate crimes, which enhanced the sentencing range from the second-degree to first-degree level (ten to twenty years) upon a finding by the sentencing court by

a preponderance of the evidence that the defendant committed the crime with a racially biased purpose. *Id.* at 469. The New Jersey trial court made such a finding and imposed a twelve-year sentence, which two state appellate courts later affirmed. *Id.* at 471.

This Court held that application of New Jersey's hate crime statute, which the indictment did not mention, resulted in the judge making the type of finding traditionally reserved for the jury. This Court found that Apprendi had a Sixth Amendment right to a jury finding of racial bias because it increased the penalty for the crime beyond the prescribed statutory maximum for the charged offense. *Id.* at 475-76, 494 n.19. This Court thus ruled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

The due process and notice concerns underlying the *Apprendi* analysis do not apply to Arizona's capital sentencing procedures, because the existence of an aggravating factor does not increase the *range* of sentence for a charged offense of first-degree murder. Furthermore, *Apprendi*'s mechanistic test based on whether a factual determination "increases the penalty for a crime beyond the prescribed statutory maximum" is not easily applied to capital cases because, as this Court has long-recognized, "[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (quoting *Furman*, 408 U.S. at 306 (Stewart, J., concurring)). *Apprendi*'s mathematical precision fails to account for the unique Eighth Amendment requirements

imposed only in capital cases. *See Walton*, 497 U.S. 639, 671 (Scalia, J., concurring). Accordingly, *Apprendi* does not compel the conclusion that a judge determination of aggravating factors in a capital sentencing proceeding violates the Sixth Amendment.

1. Death Is Within the Statutory Range of Sentences Available for First-Degree Murder.

The indictment in this case (J.A. at 8a-9a) charged Ring with committing first-degree murder under A.R.S. § 13-1105(C), which provides:

> First degree murder is a Class 1 felony and is punishable by *death or life imprisonment* as provided by section 13-703.

(Emphasis added.) A.R.S. § 13-703(A) is equally unambiguous:

> A person guilty of first degree murder as defined in section 13-1105 shall suffer *death or imprisonment* in the custody of the state department of corrections for life as determined and in accordance with the procedures provided in subsections B through G of this section.

(Emphasis added.)

Given the clear language of A.R.S. §§ 13-1105 and 13-703, death is within the range of punishment available for someone convicted of first-degree murder. Consequently, a defendant charged with first degree murder in Arizona "is *charged with* actions that expose him to the death penalty," and his right to a jury trial extends to "all the elements of the *charge*." *Apprendi*, 530 U.S. at

497 (citation and internal quotation omitted) (emphasis added).

The Arizona statute upheld in *Walton* remains materially unchanged. So too does this Court's determination of what a "range of sentencing" means for Sixth Amendment purposes:

> [T]he finding of aggravating facts falling within the traditional scope of capital sentencing [is] a choice between a greater and a lesser penalty, not . . . a process of raising the ceiling of the sentencing range available.

Jones v. United States, 526 U.S. 227, 251 (1999) (characterizing the holding in *Walton*); *accord Arizona v. Rumsey*, 467 U.S. 203, 209-10 (1984) ("The sentencer – the trial judge in Arizona – is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years.").

In *Walton*, this Court rejected the argument that aggravating circumstances are elements of the crime that must be found by the jury. 497 U.S. at 648-49. Finding that aggravating circumstances are simply "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment," this Court upheld Arizona's capital sentencing procedures, which authorize a judge, rather than a jury, to determine the existence of aggravating and mitigating circumstances, and to decide whether to impose the death penalty. *Id.*

Walton was not an aberration. In *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion), this Court held that jury sentencing was not "constitutionally required" under the Eighth Amendment. This Court

noted that judicial sentencing appeared to further the goals of the Eighth Amendment by ensuring "even greater consistency in the imposition at the trial court level . . . [of] sentences similar to those imposed in analogous cases." *Id.*

Proffitt was applied in *Spaziano v. Florida*, 468 U.S 447 (1984), in which this Court specifically rejected a claim that the Sixth Amendment right to a jury trial applies to the sentencing process. Even though Florida's death penalty sentencing scheme provided for an advisory recommendation by the jury, *Spaziano* held that the state could conduct a resentencing hearing without such an advisory recommendation. 468 U.S. at 453.

Subsequently, in *Cabana v. Bullock*, 474 U.S. 376 (1986), *overruled in part on other grounds by Pope v. Illinois*, 481 U.S. 497 (1987), this Court held that the Sixth Amendment does not require a jury determination of eligibility for the death penalty in a felony murder case under *Enmund v. Florida*, 458 U.S. 782 (1982):

> [O]ur ruling in *Enmund* does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury. Rather, as the Fifth Circuit itself has recognized, *Enmund* "does not affect the state's definition of any substantive offense, even a capital offense." . . .
>
> . . .
>
> . . . *Enmund* . . . imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death. Nonetheless, the rule remains a substantive limitation on sentencing, and like

> other such limits it need not be enforced by the jury.

Cabana, 474 U.S. at 385-86 (citations omitted).

In *Poland v. Arizona*, 476 U.S. 147 (1987), this Court addressed a related issue and concluded that an appellate court's rejection of the sole aggravating circumstance underlying the defendants' death sentence did not "acquit" the defendants of the death penalty. This Court held that because aggravating circumstances are not elements of the crime under Arizona's death penalty statute the Double Jeopardy bar of the Fifth Amendment did not preclude the imposition of the death penalty (based on the aggravating circumstance of pecuniary gain) in the defendants' second trial even though they had been "acquitted" of the only aggravating circumstance (cruelty) found to exist during their first trial. *Id.* at 150, 156-57.

Walton was a natural extension of those cases:

> Walton also suggests that in Florida aggravating factors are only sentencing "considerations" while in Arizona they are "elements of the offense." But as we observed in *Poland v. Arizona*, an Arizona capital punishment case: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (*i.e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not

> 'acquit' a defendant (*i.e.*, preclude the death penalty)."

Our holding in *Cabana v. Bullock*, provides further support for our conclusion. *Cabana* held that an appellate court could constitutionally make the *Enmund v. Florida* finding – that the defendant killed, attempted to kill, or intended to kill – in the first instance. We noted that "*Enmund*, 'does not affect the state's definition of any substantive offense, even a capital offense,'" and that "while the Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury." *Enmund* only places "a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury." If the Constitution does not require that the *Enmund* finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding, we cannot conclude that a State is required to denominate aggravating circumstances "elements" of the offense or permit only a jury to determine the existence of such circumstances.

> We thus conclude that the Arizona capital sentencing scheme does not violate the Sixth Amendment.

497 U.S. at 648-49 (citations omitted).

In a case decided contemporaneously with *Walton*, this Court held in *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990), that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by

harmless-error review." This Court affirmed that appellate court determinations of sentencing findings do not compromise the Sixth Amendment.

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

Clemons, 494 U.S. at 745-46 (citing *Cabana*, *Enmund* and *Spaziano*, among other cases).

These cases show that the clear language of the Arizona statute is properly interpreted to include death within the range of punishment for someone convicted of first-degree murder. *Apprendi* does not require a different conclusion.

The Arizona Supreme Court's statement in the *Ring* opinion that "a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings," 25 P.3d at 1151, does not alter the analysis. That same court has previously made clear that death is within the range of punishment for first-degree murder. In rejecting a vagueness challenge to

Arizona's capital sentencing statute, the Arizona court stated:

> Arizona's statute . . . [A.R.S. § 13-703(A)] states with clarity that *the punishment for committing first degree murder is either death, natural life, or life in prison with the possibility of parole.* Thus, a person of ordinary intelligence can easily determine the *range of punishment* he or she faces for committing first degree murder.

State v. Wagner, 982 P.2d 270, 273 (Ariz. 1999) (emphasis added); *see also State v. Blazak*, 560 P.2d 54, 61 (Ariz. 1977) (rejecting argument that Arizona's present sentencing system creates an aggravated or capital murder class of homicide; procedure merely sets forth guidelines for determination of punishment after a defendant is convicted of first-degree murder).

In light of *Wagner* and *Blazak*, the Arizona Supreme Court's statement in *Ring* could be just as accurately restated as follows:

> A defendant cannot receive the maximum penalty authorized under the range of sentences allowable for a first-degree murder conviction in Arizona solely on the basis of the jury's verdict.

The fact that the Arizona Supreme Court's statement can be reworded – without changing its import – in such a way to satisfy both *Apprendi* and *Walton* demonstrates that the statement, by itself, is not controlling regarding the issue before this Court.

The *Ring* concurring opinion reflects this analysis:

> In this case, Ring's punishment was not above the statutory range allowed by the jury's guilty verdict. Death is plainly within the statutory range of a guilty verdict for first degree murder. A.R.S. § 13-1105(C). Such a verdict is essential to a finding that a defendant is death eligible. Only first degree murder is a capital offense. One cannot be sentenced to death without such a verdict. The jury must find all the elements of the charge under *Apprendi* and the Sixth Amendment. The factual findings in aggravation and mitigation made by the trial court are not elements of the charge triable by jury under the Sixth Amendment, but rather, capital sentencing limitations driven by the *Eighth* Amendment. *Walton v. Arizona*, 497 U.S. 639, 648, 110 S. Ct. 3047, 3054-55, 111 L. Ed. 2d 511 (1990).

Ring, 25 P.3d at 1157 (Martone, J., concurring) (emphasis in original).

The Delaware Supreme Court's discussion of that state's capital sentencing procedures in *Capano v. State*, 781 A.2d 556 (Del. 2001), is similarly instructive. The Delaware court found that the jury's guilty verdict "authorized" the death sentence, even though the penalty phase of the trial had yet to be conducted:

> Under Delaware's death penalty procedure, when a jury finds a defendant guilty of first degree murder, the jury *authorizes* the statutory maximum penalty: the death sentence, subject to the penalty phase and the judge's decision on sentencing. Once the jury during the guilt phase of the trial authorizes the maximum penalty, "it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed . . . ." We therefore conclude that the holding in *Apprendi* does not implicitly or explicitly affect the Supreme Court's previous decisions permitting judges to find statutory aggravating factors without a jury verdict on the underlying factual questions.

781 A.2d at 672-73 (citation omitted) (emphasis in original).

Ring simply reads too much into the phrase "a defendant cannot be put to death solely on the basis of a jury's verdict." The exact same statement could be applied to an *Enmund/Tison* finding. The Arizona Supreme Court's opinion does not suggest that the *Enmund/Tison* finding in the instant case hangs in the balance. Nor does Ring. Ring has not even cited to *Cabana* or otherwise discussed its holding that such a finding can be made by a judge.

Justice O'Connor's discussion of Arizona law in her *Apprendi* dissent similarly does not compel the conclusion that the existence of aggravating circumstances creates a new sentencing range. Justice O'Connor's states, "If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury's guilty verdict is life imprisonment." 530 U.S. at 537 (O'Connor, J., dissenting). As with the Arizona Supreme Court's statement, Justice O'Connor's depiction of Arizona law is accurate, but not dispositive of the issue before the Court.

The same type of statement by Justice O'Connor in *Apprendi* and by the Arizona Supreme Court in *Ring* could be made regarding other factors that do not bear

on the Sixth Amendment. For example, if a state mandates a proportionality review in capital cases (something that is not constitutionally required, *see Pulley v. Harris*, 465 U.S. 37, 44 & n.6 (1984)), it would be technically accurate to state, "A defendant cannot be put to death solely on the basis of a jury's verdict. Death can only be imposed if the defendant's sentence is proportionate to that imposed in other cases involving similarly situated defendants." Such a statement would not, however, create a Sixth Amendment right to a jury determination of the proportionality of the defendant's sentence. *See Cabana*, 474 U.S. at 385 (describing the *Enmund* finding as a type of proportionality inquiry).

Finally, to the extent the Arizona Supreme Court's statement can be interpreted as a conclusion that Arizona's capital sentencing scheme falls within the *Apprendi* analysis, that conclusion is not controlling. In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), this Court considered a claim that Wisconsin's sentencing enhancement for discriminatory intent violated the First Amendment. Although the Wisconsin Supreme Court had determined that the enhancement statute violated the First Amendment "by punishing what the legislature has deemed to be offensive thought," rather than conduct, this Court rejected that analysis:

> There is no doubt that we are bound by a state court's construction of a state statute. . . . But here the Wisconsin Supreme Court did not, strictly speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase. Rather, it merely characterized the "practical effect" of the statute for First Amendment purposes. . . . This assessment does not bind us. Once any

> ambiguities as to the meaning of the statute are resolved, we may form our own judgment as to its operative effect.

508 U.S. at 483-84.

There are no ambiguities regarding the sentencing range contemplated in Arizona's capital sentencing statutes. Under A.R.S. §§ 13-1105 and 13-703, death is within the range of sentences available for a defendant convicted of first-degree murder. *Apprendi* is distinguishable on that basis.

2. Ring Had Actual Notice that He Faced a Possible Death Sentence.

The charging instrument in *Apprendi* afforded no notice that the defendant's sentence could be increased beyond the ten-year statutory maximum sentence for a second-degree offense. The indictment referred only to a statute defining the second-degree offense; it did not reference an additional hate crime statute that enhanced the sentencing range based on the additional finding of racial bias.

In contrast, the indictment in this case charged Ring with first-degree murder under A.R.S. § 13-1105(C), which states that "[f]irst degree murder is a Class 1 felony *and is punishable by death or life imprisonment* as provided by section 13-703." (Emphasis added.) Moreover, unlike the charging instrument in *Apprendi*, the indictment in this case referred specifically to the separate sentencing statute, in this case the capital sentencing provision that enumerates aggravating factors.

Contrary to Ring's assertion, Arizona's capital sentencing scheme has not "done much the same" as New Jersey's hate crime enhancement scheme, simply because both schemes involve more than one statute. (Brief for Petitioner at 19.) The deficiency in the New Jersey scheme was that the defendant had no means of discerning that he was subject to a sentence enhancement or the grounds upon which the enhancement could rest. That deficiency is not present here.

Moreover, the State did not rest on formal statutory notice. As required by Rule 15.1(g)(1) of the Arizona Rules of Criminal Procedure, the State filed a notice of intent to seek the death penalty within thirty days of indictment. "Rule 15.1(g) was adopted primarily because due process requires adequate notice to capital defendants that they might be sentenced to death." *Barrs v. Wilkinson*, 924 P.2d 1033, 1035 (Ariz. 1996) (citing *Lankford v. Idaho*, 500 U.S. 110 (1991)). When death is a possible punishment, other procedures are also brought to bear. *See, e.g.*, Ariz. R. Crim. P. 18.4(b) cmt. at (14) ("death-qualification" of jury panel). Ring had more than statutory notice; he had actual notice that he might receive a death sentence. He has no plausible argument that he was unaware he faced a possible death sentence if convicted of the charged offense.

3. Ring's Analysis Misconstrues *Apprendi* and Its Underpinnings.

Apprendi revisited the same issue presented in several other noncapital criminal cases: whether a particular statute relieved the state of its traditional obligation under the Sixth and Fourteenth Amendments to prove each element of a crime to a jury, beyond a reasonable

doubt, by recasting elements as "sentencing factors." However, the determination of aggravating factors underlying a death sentence has never been part of the jury's traditional role.

Ring's analysis fails because he cannot establish that the aggravating factors in the Arizona statute are in reality elements of a more severely punishable uncharged crime. As Ring repeatedly states, it is not the statutory label of a finding, but rather its effect, that controls whether it is an element or a sentencing factor. *Apprendi* relied on several Sixth Amendment cases in an effort to discern the functional distinction between an element and a sentencing factor. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court struck down a Maine statute because it effectively enabled prosecutors in first-degree murder cases to avoid the Sixth and Fourteenth Amendment strictures of *In re Winship*, 397 U.S. 358 (1970), by creating a presumption of murderous intent that a defendant had to affirmatively rebut. *Apprendi* characterized *Mullaney* as "dismiss[ing] the possibility that a State could circumvent the protections of *Winship* merely by redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 530 U.S. at 485 (internal quotations omitted).

Arizona's capital sentencing statute does not redefine any of the historic elements of first-degree murder. The Arizona legislature enacted the first version of the current capital sentencing statute in 1973, in direct response to this Court's declaration in *Furman* that a death sentence imposed in the unguided discretion of a jury violated the Eighth Amendment. *State v. Gretzler*, 659 P.2d 1, 12-13 (Ariz. 1983). The statute repealed by

the 1973 legislation was the last in a line of first-degree murder statutes originating in Arizona's territorial days. Every successive version of the pre-*Furman* statutes placed unfettered discretion in the jury (or the court in bench trials) to sentence first-degree murderers to either death or life imprisonment. *See* Ariz. Terr. Pen. Code § 174 (1901); Ariz. Pen. Code § 173 (1913); A.R.S. § 43-2903 (1938); A.R.S. § 13-453 (1956). The capital sentencing statute enacted in 1973, now codified as A.R.S. § 13-703, shifted the sentencing decision to the trial court. 1973 Ariz. Sess. Laws ch. 138, § 5 (originally codified as A.R.S. § 13-454). It also strictly limited the sentencing court's discretion to impose the death penalty to cases in which the court found, beyond a reasonable doubt, the existence of at least one specifically enumerated aggravating circumstance. *Id.* The 1973 legislation did not amend Arizona's substantive first-degree murder statute, which remains today substantially identical to its nineteenth century territorial counterpart. *Compare* Ariz. Terr. Pen. Code, § 173 (1901), *with* A.R.S. § 13-1105(A) (2000).

The aggravating factors in A.R.S. § 13-703(F) have never been part of the definition of first-degree murder in Arizona. Thus, this Court properly determined in *Poland* that the aggravating circumstances specified in Arizona's capital sentencing scheme are not elements of the offense, 476 U.S. at 156-57, and the *Mullaney* concern addressed in *Apprendi* is not present here.

Apprendi also relied upon *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which examined a Pennsylvania statute that imposed a mandatory minimum five-year sentence if the judge found, by a preponderance of the evidence, that the defendant "'visibly possessed a

firearm in the course of committing one of these specified felonies.'" *Apprendi*, 530 U.S. at 486 (quoting *McMillan*, 477 U.S. at 81-82). *Apprendi* characterized the inquiry in *McMillan* as whether the statute "r[a]n afoul of our previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal statute solely to avoid *Winship*'s strictures." *Id.*

Arizona's post-*Furman* capital sentencing statute does not violate either of these admonitions. The 1973 enactments left the same prima facie elements of first-degree murder exactly as they were. To this day, the State has the burden of proving the same prima facie elements of first-degree murder to a jury, beyond a reasonable doubt. Far from relieving the State of its evidentiary burden in the jury trial, the current capital sentencing statute imposes *additional* evidentiary burdens to be carried beyond a reasonable doubt in a hearing before the court, and as an absolute prerequisite to imposition of a death sentence.

The Arizona capital sentencing statute similarly does not breach the second *McMillan* admonition. The Arizona Legislature adopted the present aggravation/mitigation system from the Model Penal Code to correct the Eighth Amendment infirmity identified in *Furman*. *See Gretzler*, 659 P.2d at 12-13. Accordingly, the Arizona Legislature did not "tailor the form" of its capital sentencing statute to avoid the Sixth and Fourteenth Amendment strictures of *In re Winship*. A.R.S. § 13-703(F) is not "tailored to permit the . . . finding to be a tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88.

Ring offers no analysis regarding whether Arizona's capital sentencing statute raises the *Winship* concerns identified in *McMillan*. He refers to *McMillan* only once, to restate this Court's conclusion that *McMillan* did not compel a different result in *Apprendi*. (Brief for Petitioner at 15.)

What Ring does offer is a reiteration of this Court's statement in *Apprendi* that the Sixth Amendment requires a jury to find any fact that would "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." 530 U.S. at 494. Indeed, he quotes the passage eight times, and paraphrases it as many more. (Brief for Petitioner at 3, 9-10, 13, 14, 15, 17, 19, 34.) But Ring abandons Sixth Amendment analysis at that point. He does not discuss the Arizona capital sentencing statute beyond repeating what Justice O'Connor stated in her *Apprendi* dissent and the Arizona Supreme Court observed in *State v. Ring*. As noted previously, those statements are not dispositive of the issue before this Court.

Ring's analysis regarding the effect of the State's motivations for enacting a post-*Furman* capital sentencing statute is flawed. The State has never contended that its Eighth Amendment motivations in enacting the statute insulate it from attack on Sixth Amendment grounds. (Brief for Petitioner at 31.) Rather, the Eighth Amendment *function* of the aggravating factors, and their limiting *effect*, establish that A.R.S. § 13-703 remains consistent with the Sixth Amendment. Justice Scalia noted in *Walton*, "when a State adopts capital punishment for a given crime, . . . the Eighth Amendment bars it from giving the sentencer unfettered discretion to select the recipients, but requires it to

establish, in advance, and convey to the sentencer, a governing standard." 497 U.S. at 671 (Scalia, J., concurring). The State's undisputed motivation – to comply with the Eighth Amendment's mandate to impose statutory limitations on capital sentencing discretion – distinguishes this case from *McMillan* and illuminates the purpose and effect of aggravating factors in Arizona. Sixth Amendment jury trial requirements do not attach to determinations of aggravating factors merely because this Court requires states to codify such factors (or other comparable limiting criteria) to satisfy the Eighth Amendment.

Ring argues that if a State's motivations control the inquiry, then a defendant in one state would receive a jury trial to determine the same fact that a trial court would determine in another state. This, he believes, will "embroil this Court in difficult State-by-State analyses as to whether a particular change in a State's definition of capital homicide was prompted by a desire to adhere to the Eighth Amendment." (Brief for Petitioner at 31.)

Ring's argument fails, however, because anomalous treatment of sentencing considerations from state to state is perfectly acceptable. A state legislature has the prerogative to incorporate a fact into the substantive definition of "capital murder" and treat it as an element. When it does so, the jury trial guarantee obviously attaches to proof of the element. That does not mean that other states must follow suit. One state's elevation of a factor to the status of an element does not create a jury trial right to a determination of that element in other states. One state legislature cannot amend another state's statutes. It cannot create a Sixth Amendment

right in another state. Ring is using the Sixth Amendment to justify a lockstep capital sentencing approach that this Court has expressly disavowed. *See Spaziano*, 468 U.S. at 464 ("[W]e are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme."). Even if a majority of states determine that capital sentencing should be performed by a jury, the Sixth Amendment does not require jury sentencing: "What we do not accept is that, because juries may sentence, they constitutionally must do so." *Id.* at 463 n.8. A legislature's decision to create additional elements of murder, which effectively serve the Eighth Amendment narrowing function (regardless of motivation) is a matter of largesse for Sixth Amendment purposes.

While Arizona's capital sentencing procedures offer criminal defendants some of the protection traditionally afforded elements of a crime (*i.e.*, proof beyond a reasonable doubt with evidence admissible in accordance with the rules of evidence), the procedures do not infringe on the traditional jury role of determining the elements of the crime. Overruling *Walton* based on *Apprendi* would mechanistically create an illusory Sixth Amendment right where none was intended or otherwise justified. Accordingly, *Apprendi* does not compel the conclusion that Arizona's statutory scheme violates the Sixth Amendment.

B. History Demonstrates That Judicial Fact Finding Under Arizona's Capital Sentencing Statute Is Consistent With The Jury Trial Guarantee Of The Sixth Amendment.

The Framers of the United States Constitution never contemplated a jury trial of every fact controlling

sentencing. The Sixth Amendment played no part in the evolution of capital sentencing schemes, and Ring's effort to attach a Sixth Amendment imperative to modern Eighth Amendment capital sentencing requirements, such as the determination of aggravating factors under A.R.S. § 13-703(F), is unsupportable. Although there may be tension between the language in *Apprendi* and the capital sentencing statute upheld in *Walton*, there is no tension between the Arizona statute and the Sixth Amendment.

Original intent controls the historical analysis. "The process of determining the content of the Sixth Amendment right to jury trial has long been one of careful evaluation of, and strict adherence to the limitations on, that right as it was known in criminal trials at common law." *Johnson v. Louisiana*, 406 U.S. 366, 370 at n.6 (1972) (Powell, J., concurring).

Ring begins with, then builds upon, a flawed characterization of the law as it existed in 1791. Ring declares it was "well understood . . . that a jury's guilty verdict with respect to the crime of capital homicide included within it all factual findings necessary to allow the imposition of a death sentence." (Brief for Petitioner at 25.) Ring neglects to mention that *all* capital homicide (murder) convictions resulted in a death sentence by operation of law. *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (plurality opinion). Jurists in 1791 shared no "understanding" that a jury verdict had to incorporate findings "necessary to allow the imposition of a death sentence," because no other sentence was "allowed" in the first instance. Any understanding of the jury's role in murder trials beyond the bare determination of guilt or innocence could only have been an

understanding that the jury had to find something *more* than the prima facie elements of murder that automatically resulted in a death sentence. No such understanding could have existed given the fixed, automatic death penalty for murder.

Ring cannot alter the historical fact that juries had no role in fixing punishments in 1791. The Framers had no reason to consider whether the Sixth Amendment jury trial right applied to a fact that increased a murderer's sentence from life to death, because death was the only penalty for murder, without exception. *See Roberts v. Louisiana*, 428 U.S. 325, 332 (1976) (plurality opinion).

Under these circumstances, the Framers can only have considered the jury's singular function – returning a guilty or not guilty verdict – when they created an inviolate constitutional right to trial by an impartial jury of one's peers. "The right to be tried by a jury in criminal cases obviously means the right to have a jury determine whether the defendant has been proved guilty of the crime charged." *Neder v. United States*, 527 U.S. 1, 31 (1999) (Scalia, J., *concurring in part and dissenting in part*). There is no historical "understanding" built into the Sixth Amendment that requires a jury to decide every fact requisite to the imposition of a death sentence.

Ring's discussion of criminal homicide under the common law is particularly misleading. He correctly notes that homicide developed into two crimes, murder and manslaughter, distinguishable by the element of malice aforethought, and that only the former was punishable by death. *See Jones*, 526 U.S. at 240; *Patterson v. New York*, 432 U.S. 197, 216-17 (1977). But

the critical conclusion Ring draws from those facts is illogical. The common law courts did not start with a noncapital crime and "increase . . . the quantum of facts necessary to establish capital murder." (Brief for Petitioner at 25.) To the contrary, the common law *exempted* from capital punishment a wide category of homicides that it previously punished by death regardless of circumstances such as malice aforethought or the commission of another felony. *See Eddings v. Oklahoma*, 455 U.S. 104, 110-11 (1982).

Ring also argues that "the right of the jury to make the factual determinations that would determine whether a defendant could be subjected to capital punishment" was "particularly well established" by 1791. (Brief for Petitioner at 25-26) (internal quotation omitted). Alternative sentences for murder did not appear, however, until the mid nineteenth century. Tennessee enacted the first discretionary death penalty statute in 1838, followed by Alabama in 1841, and Louisiana in 1846.[2] *Woodson*, 428 U.S. at 291. As Ring states, postconstitutional American legislatures gradually began replacing common law murder statutes with provisions defining murder by degrees. *Schad v. Arizona*, 501

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[2] This development stemmed from jury nullification and had nothing to do with Sixth Amendment jury trial guarantees. *See Woodson*, 428 U.S. at 296-300. Several jurisdictions retained their mandatory capital punishment statutes well into the twentieth century. *See, e.g.*, Fla. Stat. § 782.04 (1941). Moreover, some of the discretionary statutes, including Arizona's, vested sentencing discretion in the court in guilty plea cases. *See, e.g.*, Fla. Stat. § 775.082(1) (1972). Others placed the sentencing decision in the trial court's hands even when the case was tried to a jury. *E.g.*, Del. Rev. Code ch. 155, § 35 (1935); *Williams v. New York*, 337 U.S. 241, 244-45 (1949) (rejecting due process challenge to New York statute giving courts discretion to sentence first-degree murderers to death or life imprisonment).

U.S. 624, 640-41 (1991) (plurality opinion). The early first-degree murder statutes, like their contemporary counterparts, typically required proof of premeditation or death resulting from the commission of a felony, just as common law murder required proof of either premeditation (or other manifestations of "malice aforethought") or death resulting from the commission of a felony. *Id.* at 640-41 & n.8. Death was the exclusive, automatic penalty under both common law murder and the early first-degree murder statutes. *See Winston v. United States*, 172 U.S. 303, 310-11 (1899); *Tison*, 481 U.S. at 159 n.2 (Brennan, J., dissenting) (discussing common law murder).

Like the common law courts that separated murder from manslaughter, the American legislatures did *not* create a new category of homicides, punishable by a more severe sentence, upon proof of any fact that was not *already* an element of common law murder. *See Schad*, 501 U.S. at 640-41. The movement toward classification of murder by degrees "*narrow*[*ed*] the definition of capital homicide." *Roberts*, 428 U.S. at 332; *see also, Furman*, 408 U.S. at 297 (Brennan, J., concurring) ("the crime of capital murder has itself been *limited*" by statutes dividing murder into degrees) (emphasis added). Accordingly, Ring errs by stating that first-degree murder under the postcolonial statutes "required the proof of additional facts" in order to impose a death sentence. (Brief for Petitioner at 27.)

Ring's description of the post-*Furman* capital sentencing statutes suffers from the same defect. States did not "once again add[] to the quantum of facts needed to establish capital homicide" in the effort to satisfy Eighth Amendment requirements under *Furman*. (Brief for

Petitioner at 29.) Aggravating circumstances in Arizona's capital sentencing statute reduced the punishment for a vast number of first-degree murders that would otherwise have been punishable by death regardless of such circumstances under the pre-*Furman* predecessor statute. The new capital sentencing statute did not create a higher degree of murder requiring proof of "additional facts."

The State has never suggested that "the Sixth Amendment guarantee of jury trial no longer applies to all facts necessary for the imposition of a death sentence," as Ring contends. (Brief for Petitioner at 26.) As the historical record demonstrates, the Sixth Amendment never embodied such a right in the first instance.

C. *Walton* is Consistent with a Long Line of Cases Holding That Either a Judge or a Jury Can Make Eighth Amendment Capital Sentencing Findings Without Implicating the Sixth Amendment.

Walton rejected the argument that aggravating circumstances are elements of the crime that must be found by the jury. 497 U.S. at 648-49. As discussed above, *Walton* was not an aberration. *Proffitt, Spaziano, Cabana, Poland* and *Clemons* each rejected Ring's basic premise. *Hildwin v. Florida*, 490 U.S. 638 (1989), made a similar finding, holding that although Florida state law required that a jury return an advisory sentencing verdict, the Sixth Amendment did not require the jury to specify the aggravating factors permitting imposition of a death sentence.

In the years since *Walton* and *Clemons*, there has been extensive litigation of capital cases, but there have

been no reported cases criticizing or repudiating those decisions. As recently as 1997, this Court expressly affirmed the principles underlying those decisions. *See Lambrix v. Singletary*, 520 U.S. 518, 531 (1997) (reaffirming *Clemons*).

Even in *Apprendi*, this Court declined to criticize capital sentencing procedures carried out by a judge, rather than by a jury:

> [T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. For reasons we have explained, the capital cases are not controlling.

Apprendi, 530 U.S. at 496 (citations omitted).

Ring's argument ignores the historical underpinnings of *Walton*. He neglects even to mention *Cabana*, which is of particular significance because Ring was convicted of felony murder and the trial court made the requisite *Enmund/Tison* finding without any jury input. As *Walton* noted, arguments regarding "eligibility" for the death penalty apply equally to an *Enmund/Tison* finding made by a judge, rather than by a jury. 497 U.S. at 649.

The instant case does not overcome the doctrine of *stare decisis*. Although "*stare decisis* is not an inexorable command, . . . even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be

supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citations and internal quotation marks omitted).

Ring's claim does not present the special justification necessary to overrule *Walton*. Given the absence of any reported decisions suggesting that *Walton* and the cases cited above have made the death penalty process unfair or unreliable, there is no compelling reason for this Court to reverse itself.

II. RING'S SENTENCE SHOULD NOT BE VACATED EVEN IF *WALTON* IS OVERRULED BECAUSE THE EXISTENCE OF THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE SUPPORTING THE SENTENCE IS NECESSARILY IMPLIED IN THE JURY'S GUILTY VERDICTS OF FELONY MURDER AND ARMED ROBBERY.

Ring's sentence should be upheld regardless whether this Court overrules *Walton* in light of *Apprendi* because the jury's verdict necessarily implied the existence of the sole aggravating circumstance upon which the death sentence rests. Accordingly, Ring's death sentence was not "a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494.

The jury convicted Ring of first-degree felony murder under A.R.S. § 13-1105(A)(2), which states:

> A person commits first degree murder if . . . [a]cting either alone or with one or more other persons the person commits or attempts to commit . . . robbery under § 13-1902, 13-1903 or 13-1904 . . . and in the course of and in furtherance of the offense or immediate flight

> from the offense, the person or another person causes the death of any person.

The jury also convicted Ring of armed robbery under A.R.S. §§ 13-1902 and 13-1904. Section 13-1902 states:

> A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

Section 13-1904 states:

> A person commits armed robbery if, in the course of committing robbery as defined in § 13-1902, such person or an accomplice:
>
> 1. Is armed with a deadly weapon or a simulated deadly weapon; or
>
> 2. Uses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon.

The trial court instructed the jury that felony murder required a finding that the victim died during the commission of an armed robbery. (J. A. at 21a.)

Ring's death sentence rests solely on the aggravating circumstance of pecuniary gain, set forth in former A.R.S. § 13-703(F)(5)[3] as commission of murder "in expectation of the receipt . . . of anything of pecuniary value." The unanimous felony murder guilty verdict, the unanimous armed robbery guilty verdict, and the jury

[3] Now renumbered as A.R.S. § 13-703(G)(5).

instructions necessarily implied that Ring and his accomplices murdered the victim in expectation of the receipt of pecuniary gain, independently of any finding of fact made by the trial court.

The pecuniary gain finding derived from the fact that Ring and his accomplices committed the murder in expectation of receiving the money in the armored truck. The State cannot have proven the elements of felony murder and armed robbery without also necessarily proving that Ring committed the murder "in expectation of the receipt of anything of pecuniary value." The money taken from the armored truck was the property referred to in the robbery statute, A.R.S. § 13-1902, which the murderers took from Magoch's immediate presence by using deadly force to prevent his resistance to their taking it. *Ring*, 25 P.3d at 1154 ("Here, killing Magoch was for no other comprehensible reason than to facilitate the robbery.").

The record demonstrates that the jury indirectly, but conclusively, found the existence of the aggravating circumstance beyond a reasonable doubt. Any *Apprendi* error is harmless because Ring premises his Sixth Amendment claim upon the lack of a jury finding that he committed the murder "in expectation of the receipt of anything of pecuniary value," yet the jury effectively made the pecuniary gain finding. *See United States v. Pressler*, 256 F.3d 144, 157 n.7 (3rd Cir. 2001) ("The 'prescribed statutory maximum' is the longest sentence that a defendant could receive based solely on the facts necessarily encompassed within the jury's verdict of guilty."); *see also Keels v. United States*, 785 A.2d 672, 685 (D.C. App. 2001) (verdict necessarily implied

existence of enhancing factor found by sentencing court; no *Apprendi* violation because enhancement can be "predicated upon a jury finding beyond a reasonable doubt of, *or coextensive with*, that same factor." (emphasis added)); *United States v. Stewart*, 256 F.3d 231, 253 (4th Cir. 2001) (*Apprendi* violation harmless because "uncontested and overwhelming evidence" implied defendant's sentence would not have exceeded the statutory maximum but for erroneous jury instruction).

State v. Sansing, 26 P.3d 1118 (Ariz. 2001), does not compel a contrary conclusion. In *Sansing*, the Arizona Supreme Court found that although pecuniary gain was a motive for the defendant's decision to beat and bind the victim, her rape and murder "appear[ed] to be separate events." 26 P.3d at 1126. In contrast, in the present case, the murder was committed for the sole purpose of accomplishing a robbery. *Ring*, 25 P.3d at 1154. *Sansing* does not call into question the pecuniary gain finding in this case.

For the foregoing reasons, Ring's sentence should be upheld regardless whether this Court decides that the Sixth Amendment requires a jury determination of aggravating circumstances under A.R.S. § 13-703(F).

III. A DECISION TO OVERRULE *WALTON* SHOULD NOT BE RETROACTIVE.

In the event that this Court overrules *Walton*, it should not apply the decision retroactively. Decisions overruling precedent and establishing a new rule of constitutional law are applied retroactively to state and federal cases that are not yet final. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). "Final" for retroactivity

purposes refers to cases "'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed.'" *Teague v. Lane*, 489 U.S. 288, 295 (1989) (plurality opinion) (quoting *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986)). In cases that are final, a Supreme Court decision establishing a new rule of constitutional law is "almost automatically nonretroactive." *Allen v. Hardy*, 478 U.S. 255, 258 (1986) (citing *Solem v. Stumes*, 465 U.S. 638, 646-47 (1984)).

Under *Teague*, a new constitutional rule does not apply to cases on collateral review unless it falls within one of two exceptions. 489 U.S. at 311 (plurality opinion). The first exception applies to new rules making certain conduct exempt from the legislature's power to define criminal acts. *Id*. This exception, which encompasses new interpretations of substantive law, is inapplicable here. *McCoy v. United States*, 266 F.3d 1245, 1256-57 n.16 (11th Cir. 2001); *Daniels v. United States*, 254 F.3d 1180, 1192 (10th Cir. 2001) (deciding in the context of a successive motion under 28 U.S.C. § 2255 that *Apprendi* falls outside *Teague*'s first exception); *United States v. Moss*, 252 F.3d 993, 997 & n.3 (8th Cir. 2001) (discussing the second exception as the only exception "[r]elevant to our inquiry"); *United States v. Sanders*, 247 F.3d 139, 148 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1237 (9th Cir. 2000). As this Court stated in *Apprendi*, "[t]he substantive basis for New Jersey's enhancement is . . . not at issue; the adequacy of New Jersey's procedure is." 530 U.S. at 475.

Under the second *Teague* exception, courts give retroactive effect to a "watershed" rule of criminal procedure that implicates the fundamental fairness and

accuracy of a criminal proceeding. 489 U.S. at 311-12 (plurality opinion). The holding in *Apprendi*, regardless whether it is expanded to overrule *Walton* by requiring a jury to find all facts necessary to impose a death sentence, does not raise serious questions about the fairness or accuracy of the sentencing process. Jury sentencing does not enhance the reliability of a death sentence; it is arguably less reliable than court sentencing. *See Proffitt*, 428 U.S. at 252 & n.10 (plurality opinion). Moreover, capital sentencing under A.R.S. § 13-703 requires proof of aggravating circumstances beyond a reasonable doubt. *See, e.g., State v. Djerf*, 959 P.2d 1274, 1286 (Ariz. 1998).

This Court has underscored the narrowness of this second exception by holding up the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963), as an example, and frequently reiterating the plurality's statement in *Teague*, 489 U.S. at 313, that new watershed procedural rules "would be so central to an accurate determination of innocence or guilt, we believe it is unlikely that many such components of basic due process have yet to emerge." *See, e.g., Graham v. Collins*, 506 U.S. 461, 478 (1993); *Butler v. McKellar*, 494 U.S. 407, 416 (1990); *Sawyer v. Smith*, 497 U.S. 227, 243 (1990). This Court has continued to repeat that admonition in the wake of *Apprendi*, implying that *Apprendi* is not a watershed rule. *Tyler v. Cain*, 533 U.S. 656, ___ n.7, 121 S.Ct. 2478, 2484 n.7 (2001).

Retroactive application of the *Apprendi* rule would be especially anomalous given this Court's decision in *DeStefano v. Woods*, 392 U.S. 631 (1968). There, this Court held that its decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), applying the Sixth Amendment jury

trial guarantee to the states through the Fourteenth Amendment, "should receive only prospective application." 392 U.S. at 633. If application of the Sixth Amendment *itself* is not retroactive, then neither is application of a new Sixth Amendment rule that requires a jury to decide the existence of every fact requisite to imposition of a capital sentence.

Consistent with the foregoing, courts that have examined *Apprendi* under the *Teague* retroactivity analysis have reached near consensus in finding that *Apprendi* is not retroactive. *See Moss*, 252 F.3d at 997 (*Apprendi* not a watershed rule that seriously diminishes fairness of trial; noting that an "overwhelming majority" of federal district courts had found *Apprendi* was nonretroactive); *Sanders*, 247 F.3d at 151 (because *Apprendi* affects fact-finder and standard of proof for only one element out of several, change is not "a watershed rule of criminal procedure which 'alter(s) our understanding of the bedrock elements essential to the fairness of a proceeding.'") (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)); *McCoy*, 266 F.3d at 1258; *Forbes v. United States*, 262 F.3d 143, 145 (2d Cir. 2001); *Jones*, 231 F.3d at 1236; *Whisler v. State*, 36 P.3d 290, 299-300 (Kan. 2001); *People v. Helton*, 749 N.E.2d 1007, 1010 (Ill. App. 2001). *But see People v. Rush*, 757 N.E.2d 88, 99-100 (Ill. App. 2001).

Because the rule in *Apprendi* falls outside either of the *Teague* exceptions, as nearly all courts examining the issue have concluded, it should not be applied retroactively to cases in which the conviction and sentence are final.

CONCLUSION

Based on the foregoing authorities and arguments, the State of Arizona respectfully requests this Court to affirm the judgment of the Arizona Supreme Court.

Respectfully submitted,

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